02-9462

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GARY EHRLICH and MARY ANNE EHRLICH,
Plaintiffs-Appellants,

v.

AMERICAN AIRLINES, INC., AMERICAN EAGLE AIRLINES, INC.
and SIMMONS AIRLINES, INC.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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STATEMENT OF INTEREST

The United States is a party to the Warsaw Convention and to a Protocol amending the Warsaw Convention done in Montreal in 1975 (Montreal Protocol No. 4). These agreements afford protections to passengers on international flights who seek recovery from an air carrier for injuries and death sustained while on board an aircraft, or in the course of the operations of embarking or disembarking. In addition, the United States has an interest in this case because it and its component agencies are often named as third party defendants for indemnification or contribution claims

by air carrier defendants or as defendants in tort suits brought by passengers claiming injury in an airplane accident. Accordingly, the United States has a substantial interest in the manner in which the Warsaw Convention is interpreted by the courts of this country. In response to this Court's solicitation, the United States submits the following brief in the above-captioned case as amicus curiae. The United States also accepts this Court's invitation to participate in oral argument in this case on August 25, 2003.

QUESTION PRESENTED

Whether the district court correctly concluded that plaintiffs could not state a claim for mental injuries under Article 17 of the Warsaw Convention where plaintiffs conceded that alleged mental injuries were not caused by alleged physical injuries incurred in the airplane accident.

STATEMENT OF THE CASE

A. Statement of Facts

This case arose out of an incident that occurred during the landing and evacuation of American Eagle Flight No. 4925 from Baltimore, Maryland to John F. Kennedy International Airport ("JFK") on May 8, 1999. The aircraft landed at a high rate of speed, traveled past the end of the runway, and abruptly stopped on an arrestor bed. The passengers were evacuated from the aircraft. As a result of the landing and

evacuation, both plaintiffs, who were on the first leg of an international journey, claim to have suffered physical injuries. Specifically, Gary Ehrlich claims to have sustained soft tissue injuries to both of his knees and Maryanne Ehrlich claims to have sustained soft tissue injuries to her upper extremities, right knee, back, shoulder and hips, as well as hypertension and cardiac changes. Plaintiffs' medical treatments have been limited to those physical injuries. In addition to their physical injuries, plaintiffs claim that they have suffered mental injuries as a result of the accident consisting of nightmares and a fear of flying. Plaintiffs admit that they have not sought any psychological treatment in connection with their mental injuries. Plaintiffs also admit that the mental injuries they claim are not related to or caused by the physical injuries they sustained in the accident. Plaintiffs' mental injuries are a result of the fear that they experienced during the accident.

B. The Warsaw Convention

All parties agree that the Warsaw Convention provides the exclusive remedy for the plaintiffs in this case. The Convention for the Unification of Certain Rules Relating to International Transportation by Air (1929), 49 Stat. 3000. T.S. No. 876, 137 U.N.T.S. 11, reprinted in note following 49 U.S.C. 40105,[1] popularly known as

[1] This brief cites the various provisions of the Convention directly. Those provisions are codified at 49 U.S.C. 40105 note.

the Warsaw Convention ("Convention"), was designed to achieve two basic purposes: to "foster uniformity in the law of international air travel," Zicherman v. Korean Air Lines Co., 516 U.S. 217, 230 (1996), and to "limit[] the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry," Eastern Airlines v. Floyd, 499 U.S. 530, 546 (1991); see also King v. American Airlines, 284 F.3d 352, 356-57 (2d Cir. 2002)(citations omitted). To those ends, the Convention prescribes an extensive set of legal principles generally applicable "to all international transportation of persons, baggage or goods performed by aircraft." Art. 1(1); see generally A. Lowenfeld & A. Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497 (1967).

At the core of the Convention is a series of provisions concerning the nature and scope of a carrier's liability for harms occurring in the course of international air travel. Article 17, which is at issue here, establishes the conditions of liability for personal injury to passengers. Article 17 states:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

The Warsaw Convention remedy for injuries arising out of international aircraft accidents is an exclusive one. See El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 161 (1999). A passenger satisfying the liability conditions of Article 17 may bring a cause of action against a carrier directly under the Convention. See Benjamin v. British European Airways, 572 F.2d 913, 919-19 (2d Cir. 1978). There is no dispute that plaintiffs' claims arise from the landing and evacuation of Flight No. 4925 which constituted an "accident" within the meaning of Article 17 of the Warsaw Convention. See Air France v. Saks, 470 U.S. 392, 395 (1985) (defining an "accident" as an "unexpected or unusual event that is external to the passenger").

C. Montreal 1999

In 1999, a new international aviation treaty was negotiated. The Convention for the Unification of Certain Rules for International Carriage by Air, signed at Montreal on May 28, 1999 ("Montreal 1999"), modernizes and is intended to replace the 1929 Warsaw Convention and its related protocols. Montreal 1999 provides for, among other things, a new two-tiered system of liability imposing strict liability on air carriers for death or injury of a passenger up to approximately $139,000. It also provides for unlimited liability above that amount except to the extent that the carrier can demonstrate that the damage was not due to the negligence or other wrongful act

or omission of the carrier or its servants or agents, or that a third party was solely responsible for the damage. Articles 17, 20, 21.[2]

The accident in this case occurred in 1999 and, thus, is governed by the Warsaw Convention and not by Montreal 1999. The negotiating history of Montreal 1999 is described in some detail here, however, because it was the most recent occasion for the signatories to Warsaw to discuss liability of air carriers for mental or emotional injuries. At Montreal 1999, the United States delegation, along with a number of other delegations, sought to adopt language that would have allowed for greater recovery for emotional distress damages than had been allowed under Article 17 of the Warsaw Convention. Specifically, on the third day of the conference (May 12), the delegates from Norway and Sweden proposed that the words "or mental" be added to qualify injury in the first sentence of the draft Article 16 (which was intended to replace Article 17 of the Warsaw Convention). See Minutes of the International Conference on Air Law held in Montreal, Canada from May 10-May 28, 1999, Volume I, page 67 (statement of Delegate of Sweden) (App. 174). Under the

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[2] Article 17(1) of Montreal 1999 states in relevant part:

> The carrier is liable for damages sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Sweden/Norway proposal, the text of Article 16 would have read "The carrier is liable for damage sustained in the case of death or bodily or mental injury of a passenger..." See Documents of the International Conference on Air Law held at Montreal, Canada May 1999, Volume II (Doc No. 10)(App.197). The objective of the proposed amendment was "that the passenger would have the right to compensation for mental injuries that they had suffered in case of an accident" and that "[t]his right should apply whether or not the passenger also suffered a bodily injury." Minutes at 67 (statement of Swedish delegate)(App.174).

The Norway/Sweden proposal to add stand-alone mental injury to Article 16 garnered substantial support at the Montreal negotiations but it was controversial and a number of delegates expressed significant concern over its adoption. See Minutes pages 67-74.[3] A number of delegates expressed that they did not oppose mental injury as long as it resulted from bodily injury. Ibid.

On the fifth day of the negotiations (May 17), the Chairman summarized what the delegates believed the state of jurisprudence to be in the courts of the parties to the Warsaw Convention. Minutes at 110-111 (App.182-183). He noted that there was still no consensus among the parties to Warsaw about the extent to which Article

[3] The Appendix filed in this appeal contains excerpts of the Minutes of the Montreal Convention. The United States provides as an addendum to this brief additional relevant pages from the Minutes that are not included in the Appendix.

17 recognized liability for mental injury. He further noted that what the drafters in Montreal sought was "uniformity" and queried whether there was a consensus among the nations that mental injury should be covered as long as it was not "mental injury per se e.g. fears and matters of that kind, unrelated to some form of bodily injury." Ibid.

The United States delegate responded to the Chairman's proposal and noted that under the jurisprudence of the United States at the time, the term "bodily injury" had been interpreted as including "mental injury that accompanied or was associated with bodily injury." Minutes at 112 (App.184). The United States delegate further noted that if the Conference ended up only stating that mental injury resulting from bodily injury was covered, "that might be a step backwards from where the state of American jurisprudence on mental injury was." Accordingly, the United States delegate stated its preference not to modify the term "bodily injury" under those circumstances and to establish legislative history that there was no intent to change the existing jurisprudence on what was or was not covered under "bodily injury." Minutes at 112 (App. 185).

At the same session, the Delegate from Chile proposed compensation for "mental injury which had an adverse effect on health" with other qualifiers such as "significant" and "important" to limit the scope of such liability. Minutes at 112

(App.184). The Chairman summarized the discussions of the May 17 session as "an emerging consensus that bodily injury would be covered [under Montreal 1999], that bodily injury which resulted in mental injury would be covered, and that mental injury independent of bodily injury would be covered only where it resulted in a substantial or significant impairment of the health of the passenger." Minutes at 117 (App.187-188).

A consensus regarding recovery for mental injury separate from bodily injury was not reached at Montreal 1999, however, and express recovery for mental injury was not incorporated into the text of the Convention. Instead, on Tuesday May 25th, the Chairman made the following agreed-on statement for the record:

> During the major discussion on how to reflect the question of mental injury, a considerable degree of reservation had been expressed by some Delegations about expressing mental injury in a form in which it would be independent of bodily injury, therefore suggesting that, to the extent that that was admissible, it would be necessary to circumscribe it greatly. Following a series of drafting permutations aimed at accommodating that concern, the Group had concluded firstly, that the concept of death or bodily injury as now contained in the Warsaw Convention and as reflected in DCW Doc. No. 3 would indeed be an adequate reflection against the background of the jurisprudence which existed in relation to the question as to the circumstances in which mental injury might be recovered. All had recognized that under the concept of bodily injury there were circumstances in which mental injury which was associated with bodily injury would indeed be recoverable and damages paid

> therefore. The Group had equally recognized that the jurisprudence in this area was still developing.

Minutes at 200-201 (Attachment A). The Chairman further stated that the changes which had been proposed to the text "were not intended to interfere with the jurisprudence under the 'Warsaw System' or indeed under the present Convention as it developed; nor was it intended to interfere with the continued development of that jurisprudence in order to address the requirements of contemporary society, particularly the development of jurisprudence in other areas of national jurisdiction." Ibid.

In the United States, the President's transmittal statement of Montreal 1999 to the United States Senate for advice and consent set forth the following explanation:

> Following extensive debate, the Conference decided not to include an express reference to recovery for mental injury, with the intention that the definition of "bodily injury" would continue to evolve from judicial precedent developed under Article 17 of the Warsaw Convention, which uses that term. The Conference adopted the following Statement * * *:
>
> > With reference to Article 16 [sic], paragraph 1 of the Convention, the expression 'bodily injury' is included on the basis of the fact that in some States damages for mental injuries are recoverable under certain circumstances, that jurisprudence in this area is developing and that it is not intended to interfere with this development, having regard to

> jurisprudence in areas other than international carriage by air; . . .
>
> International Conference on Air Law, Volume One, Minutes at pages 242-243 (Plenary, 6th Mtg. May 27, 1999).

Message from the President of the United States, 106 Cong. 2d Sess., Senate, Treaty Doc. 106-45, Article-by-Article Analysis, page 9 (Sept. 6, 2000).

On July 31, 2003, the United States Senate gave its advice and consent to ratification of Montreal 1999. The 1999 Montreal Convention will enter into force 60 days after the deposit of the 30th instrument of ratification, acceptance, approval or accession. Twenty-nine such instruments have already been deposited. Deposit of the United States' instrument of ratification, which has been prepared for the President's signature, will result in the Convention entering into force for the United States 60 days thereafter. Upon entry into force for the United States, Montreal 1999 will apply to all round trip journeys from the United States, and to other journeys between the parties which have ratified the Convention. See generally J.C. Batra, Modernization of the Warsaw System – Montreal 1999, 65 J. Air L. & Com. 429 (2000).

D. Proceedings Below

The principal dispute in this case concerns the circumstances under which a passenger may recover for mental injury under Article 17 of the Warsaw Convention. In Eastern Airlines v. Floyd, the Supreme Court held that the term "bodily injury" in Article 17 does not encompass "mental or psychic injuries" absent any physical injury. See 499 U.S. 530, 551 (1991). The Supreme Court stated, however, that it "express[ed] no view as to whether passengers can recover for mental injuries that are accompanied by physical injuries." Id. Since the Supreme Court's decision in Floyd, several district courts and the court of appeals for the Eighth Circuit have considered whether mental, or emotional, injuries accompanied by physical injuries are compensable under Article 17. See Lloyd v. American Airlines, 291 F.3d 503 (8th Cir. 2002); Alvarez v. American Airlines, 1999 WL 691922 (S.D.N.Y 1999), 2000 WL 145746 (S.D.N.Y. 2000); In re Aircraft Disaster Near Roselawn, Indiana on October 31, 1994, 954 F. Supp. 175 (N.D. Ill. 1997); Longo v. Air France, 1996 WL 866124 (S.D.N.Y.); Wencelius v. Air France, Inc., 1996 WL 866122 (C.D. Cal. 1996); Jack v. TWA, 854 F. Supp. 654, 655 (N.D. Cal. 1994). The majority of courts to have addressed the issue, including the Eighth Circuit, have held that mental injuries are compensable only where those mental injuries result from physical

injuries sustained in the accident. Thus, mental, or emotional, injuries that arise solely out of the distress caused by an airplane accident are not compensable.

Adopting the majority view, the district court in this case held that plaintiffs could not recover damages for their emotional injuries because those injuries were not caused by, and did not flow from, their physical injuries. The district court recognized that courts have come to different conclusions about whether emotional injuries that do not result from a physical injury are compensable under the Warsaw Convention. App. 232-233 (citing cases). The court concluded, however, that requiring evidence that alleged emotional damages were proximately caused by physical damages sustained in the accident was necessary to prevent "great inequities" among passengers. Otherwise, one passenger who suffers a minor physical injury may recover for emotional injuries from the terror caused by the plane crash while one who escapes physically unscathed, but with the same emotional injuries, is barred from recovery. App. 234. The contrary rule, noted the district court, would allow plaintiffs to skirt the bar on recovery for purely emotional injury by alleging a remote or minor physical injury. Requiring a nexus between physical and emotional injuries is consistent with the Supreme Court's ruling in Floyd that carriers are not liable for purely mental injuries, reasoned the district court. The

district court also concluded that allowing recovery for emotional injuries not connected to physical injuries would eviscerate the rule in Floyd. App. 234.

The district court considered and rejected plaintiffs' arguments that they may recover damages for emotional injuries based on the Supreme Court's holding in Zicherman v. Korean Air Lines, 516 U.S. 217 (1996). In Zicherman, the Supreme Court held that a court must look to the substantive law of the forum in determining what would be "legally cognizable harms." In that case, however, it was undisputed that plaintiffs, the relatives of deceased victims of the Korean Air Lines crash, could collect damages resulting from the death and bodily injury of their relatives. Local law only applied where plaintiffs had demonstrated that they met the threshold requirement of Article 17: bodily injury or death. The holding in Zicherman, wrote the district court, did not abrogate Floyd or the reasoning of the Eighth Circuit in Lloyd. App. 236.

In conclusion, the district court held that "a plaintiff may only recover for emotional damages caused by physical injuries." App. 237. Because plaintiffs had not raised a genuine issue regarding a causal connection between their alleged bodily injuries and their mental suffering, the court granted defendants' motion for partial summary judgment and held that "plaintiffs may not recover for their emotional trauma resulting solely from the aberrant landing and evacuation." Id.

SUMMARY OF ARGUMENT

The district court's interpretation of Article 17 is correct. The Warsaw Convention does not permit airplane passengers to collect damages for emotional injuries incurred in an accident unless the emotional damages result from physical damages i.e. bodily injury or death caused by the accident. The district court's opinion is consistent with the decision of the United States Supreme Court in Eastern Airlines v. Floyd and with the views of the United States about the proper interpretation of Article 17 of the Warsaw Convention in this case.

ARGUMENT

EMOTIONAL INJURIES CANNOT BE RECOVERED UNDER THE WARSAW CONVENTION WHERE THERE IS NO CAUSAL RELATIONSHIP TO A PHYSICAL INJURY SUSTAINED IN AN AIRPLANE ACCIDENT

A. It is well-established that the Warsaw Convention does not allow recovery for mental or emotional injuries alone. In Floyd, passengers brought suit for alleged mental injuries incurred when their aircraft lost all engine power and cabin pressure and the flight crew informed passengers that they would be forced to ditch in the Atlantic Ocean. The flight crew was subsequently able to restart some of the engines and to land safely. After examining the original French text of the Warsaw Convention, the Supreme Court concluded that the French term “lésion corporelle”

used in the Warsaw Convention is properly interpreted to mean "bodily injury" and to exclude purely mental injuries. 499 U.S. at 542. The Supreme Court declined to decide "whether passengers can recover for mental injuries that are accompanied by physical injuries." Id.

Since the Supreme Court's decision in Floyd, the majority of courts to have examined the issue have held that psychological injuries are recoverable only if they result from physical injuries sustained in the accident. See Lloyd, 291 F.3d at 510 (damages for mental injuries must proximately flow from physical injuries caused by accident); Alvarez, 1999 WL 691922, *5, 2000 WL 145746, *2 (airline not liable because emotional injury not proximately caused by physical injury); Longo, 1996 WL 866124, *2 (same); Wencelius, 1996 WL 866122, *1 (same); Jack, 854 F. Supp. at 668 (mental injury must "flow from" physical injury); see also Burnett v. Trans World Airlines, Inc., 368 F. Supp. 1152, 1158 (D.N.M. 1973) (damages for "mental anguish directly resulting from a bodily injury" were recoverable). But see In re Aircraft Disaster Near Roselawn, Indiana on October 31, 1994, 954 F. Supp. 175 (N.D. Ill. 1997) (Warsaw Convention permits recovery for pre-impact fear if passenger suffered physical injury or death in the accident).

Most notably, the United States Court of Appeals for the Eighth Circuit has interpreted Article 17 to require that "damages for mental injury must proximately

flow from physical injuries caused by the accident." See Lloyd, 291 F.3d at 510. In Lloyd, a passenger suffered significant physical injuries during an airplane crash. Approximately nine months after the crash, the plaintiff underwent psychological treatment and was diagnosed with Post Traumatic Stress Disorder (PTSD) including flashbacks and panic attacks, and a major depressive disorder. Id. at 507. At trial, plaintiff's psychiatrist admitted that she would likely have had PTSD and depression arising out of the accident even if she had not been physically injured. The jury returned a verdict for plaintiff and the airline appealed. On appeal, the Eighth Circuit held that plaintiff's post-traumatic stress disorder was not compensable under the Warsaw Convention and that "damages for mental injury must proximately flow from physical injuries caused by the accident." Id. at 510-11.

B. Just as in Lloyd and the district court decisions in Alvarez, Longo and Jack, plaintiffs here do not claim any mental injuries arising from their physical injuries. Instead, plaintiffs concede that their alleged mental injuries arise exclusively out of the terror they experienced during the accident and not from the physical injuries they sustained during the accident. Thus, just as in Floyd, plaintiffs' mental injuries are wholly separate from any physical injuries incurred during the accident. It is the considered view of the United States that, under these circumstances, the district court appropriately held that these plaintiffs may not collect damages for their claimed

mental injuries.[4] The United States' interpretation of the treaty provisions is entitled to great weight. See Tseng, 525 U.S. at 168-69 ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty.") (citing Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982)).

The rule endorsed by the district court is an equitable one. It allows for recovery of damages arising out of a bodily injury sustained in an accident including any mental injuries that may arise from that bodily injury, such as pain and suffering or other emotional distress (if permitted by local law). To hold otherwise would create an anomalous situation where one plaintiff who happens to suffer even minor physical injuries during an accident could recover fully for his or her mental distress while another plaintiff without any physical injuries would be barred from recovery

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[4] We note that the question of the nature or degree of causal relationship between physical and emotional injuries for emotional injuries to be compensable under Article 17 is not before the Court. Plaintiffs in this case concede that there is no causal relationship between their alleged emotional injuries and their physical injuries. Rather the only question before the Court is whether a temporal relationship alone -- i.e., that both the physical injury and the claimed emotional harm occurred as a result of the same accident -- as plaintiffs suggest would satisfy Article 17. Likewise, there is no occasion for this Court to consider the question of mental injuries that arise from multiple causes (see, e.g., Baltimore & O.R. Co. v. McBride, 36 F.2d 841, 842 (6th Cir. 1930)), or the question of pre-death pain and suffering (see Dooley v. Korean Air Lines Co., Ltd., 524 U.S. 116 (1998) (assuming without discussion that such damages may be available under the Warsaw Convention, but rejecting such damages under the Death on the High Seas Act)).

for his or her mental injuries caused by their equally distressing experience. See Lloyd, 291 F.3d at 510 (quoting Jack, 854 F. Supp. at 668).[5]

C. None of plaintiffs' arguments in support of reversal of the district court's opinion withstand scrutiny.

1. Plaintiffs' reliance on the Supreme Court's decision in Zicherman is misplaced. Zicherman is completely inapposite to the case at bar. In Zicherman, the Supreme Court held that if a passenger satisfied the preconditions for liability under Article 17 of the Warsaw Convention, the court should then look to the local law under the forum's choice of law rules to determine whether a particular element of damages is recoverable. Id. at 230. See also Pescatore v. Pan Am World Airways, Inc., 97 F.3d 1, 11-15 (2d Cir. 1996) (same). Relying on Zicherman, plaintiffs argue that they are entitled to recovery for their mental injuries because one must look to the local law identified by the forum's choice of law rules for recovery of damages. Here, plaintiffs assert that the law of Maryland and New York would allow recovery for mental injuries in this kind of a personal injury action. See Pls' Opening Brief at 25 (citing New York and Maryland cases).

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[5] Notably, Congress has adopted this rule in other statutory schemes. See, e.g., 42 U.S.C. § 1997(e)(e) (prisoner may not bring claim for mental or emotional injury without a prior showing of physical injury).

Unlike Zicherman, however, where it was undisputed that plaintiffs met the threshold requirement for recovery under Article 17 because of the death of their relatives in the Korean Air Lines plane crash, plaintiffs here do not satisfy the preconditions for liability under Article 17. They are not entitled to recovery for mental damages caused by the accident because Article 17 itself does not allow recovery for mental injuries that do not arise out of a physical injury. The question of liability under Article 17 must be interpreted uniformly. See Zicherman, 516 U.S. at 230. Because there is no threshold liability for plaintiffs' mental injuries under Article 17, the district court did not err by refusing to consider the law of the forum concerning recovery of emotional damages.

2. Plaintiffs' reliance on the Supreme Court's decision in Tseng is similarly without merit. Just as in Zicherman and Floyd, Tseng directs courts to look first to Article 17, and not to local law, to determine whether plaintiffs can state a claim against defendant for a claimed injury. Article 17 preempts local law on the question of whether there is a cause of action for damages. Tseng, 525 U.S. 155, 161 ("recovery for a personal injury *** if not allowed under the Convention, is not available at all"). The Supreme Court explained that the drafters of the Warsaw Convention intended to resolve the scope of liability for airplane accidents and to leave to domestic law the proper amount of compensatory damages once liability was

established. Id. at 169 (citing Zicherman, 516 U.S. at 231). Therefore, as appellee American Airlines explains at page 20 of its brief, local law (as determined by a Zicherman choice-of-law analysis) determines the recoverable elements of damages (e.g. grief, pain and suffering, loss of consortium and loss of society) but Article 17 determines the threshold inquiry as to whether there is liability for a certain kind of injury. The holding of Tseng is, thus, completely consistent with the Supreme Court's prior holdings in Floyd that mental injuries, standing alone, are not available under Article 17 and Zicherman that Article 17, and not local law, determines the existence of liability by the airline.

3. Finally, plaintiffs argue that the United States and the vast majority of the parties to the Warsaw Convention believe that mental injuries are fully compensable under Article 17 where a physical injury has occurred. Plaintiffs base their argument on certain statements made by the United States delegation at the negotiation of the Montreal 1999 Convention that mental injuries may be recoverable under the Warsaw Convention if "accompanied by" physical injuries. Pls' Opening Br. at 17, 20 (citing Minutes at 201, 112-113. [These discussions are described more fully at pages 5-10, supra.] Relying heavily on the use of the word "accompany," plaintiffs argue that it is the position of the United States government that, as long as some physical injury

exists, all mental injuries, even those completely separate from the physical injury, are compensable under Article 17 of the Warsaw Convention. Id. at 22-23.

Plaintiffs' reliance on the United States delegation's use of the word "accompanied" in this context is misplaced. At Montreal, the United States delegation was not addressing the issue presented in this case about whether mental injuries that do not arise out of physical injuries are recoverable under Article 17 of the Warsaw Convention. The statements made by the United States delegate were made during discussions at Montreal regarding to what extent mental injury should be compensable under the new Convention. In those negotiations, the U.S. delegation supported a new provision that would have explicitly permitted recovery for mental injury independent of any bodily injury, and at a minimum sought to ensure that any new language that might be adopted in Montreal 1999 did not represent a narrowing of recovery for mental injury compared to what was available to passengers under the Warsaw Convention under developing jurisprudence at the time. It was in that very different context that the United States delegation made the statements on which plaintiffs rely.

Moreover, the use of the word "accompany" by the United States delegation is, at best, ambiguous. Webster's Third International Dictionary defines "accompany" as meaning "to go with or to attend as an associate or companion" or "to exist or

occur in conjunction or association with." Clearly, the use of the term "accompany" does not preclude the requirement of some causal relationship between the injuries. In any event, even if the reference to "accompany" is construed as plaintiffs suggest (to mean to include unrelated physical and emotional injuries), when read in context, the United States delegation was, at most, simply describing the then existing jurisprudence on the issue. See Minutes at 112 (statement by U.S. delegate that "general prevailing attitude in the courts interpreting the Warsaw Convention in the United States was that mental injury associated with bodily injury had generally been recoverable") (App. 184). At that time, at least one district court had held that unrelated physical and emotional injures arising from the same accident could be recovered under the Warsaw Convention. See In re Aircraft Disaster Near Roselawn, Indiana on October 31, 1994, 954 F. Supp. 175 (N.D. Ill. 1997). Compare Longo v. Air France, 1996 WL 866124 (S.D.N.Y.); Wencelius v. Air France, Inc., 1996 WL 866122 (C.D. Cal. 1996); Jack v. TWA, 854 F. Supp. 654, 655 (N.D. Cal. 1994). The United States delegation did not, however, advocate this as the proper construction of the Warsaw Convention.

The trend in the district court cases since Montreal, and the subsequent decision of the Eighth Circuit decision in Lloyd, make clear that a plaintiff may recover for mental or emotional injury only if such injury arises out of the physical

injury sustained in the accident. Consistent with this emerging case law, the United States has never taken an affirmative position that a plaintiff may state a claim for mental injuries under Article 17 of the Warsaw Convention that does not arise out of physical injuries or death. The narrower reading of Article 17 is also consistent with the primary purpose of the contracting parties to the Warsaw Convention: limiting liability of air carriers to foster the growth of commercial aviation. See Tseng, 525 U.S. at 169-70 (purpose of Warsaw is to balance interest of passengers seeking recovery with interest of air carriers seeking to limit potential liability).

The Supreme Court has instructed that the task of interpreting a treaty "begin[s] with the text of the treaty and the context in which the written words are used." Floyd, 499 U.S. at 534. The Court further explained that because multilateral treaties, negotiated and drafted by numerous international delegates, are unlikely to meet the standards of linguistic precision applicable to private contracts and domestic statutes, courts may "look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." Id. at 535; see also Zicherman, 516 U.S. at 226. Thus, it is notable that plaintiffs here do not identify any textual support in Article 17 or the negotiating history of the Warsaw Convention to support their position.

The treaty language and history in fact support the district court's ruling. In Floyd, the Court held the Warsaw Convention's term "bodily injury" could not properly be read to encompass free standing emotional injuries arising from an airplane accident. As Floyd noted, many jurisdictions did not recognize recovery for mental injuries at all at the time of adoption of the Warsaw Convention. Accordingly, the Court concluded that the treaty's reference to "bodily injury" precludes the recover of free standing emotional injuries.[6] Floyd, 499 U.S. at 542. As the Eighth Circuit concluded in Lloyd, the same treaty language and background, mandating "bodily injury" as a prerequisite to recovery, similarly lead to the conclusion that it is not proper to permit recovery for emotional injuries that do not result from a physical injury sustained in the same accident.

Moreover, as discussed above, "the practical construction," Floyd, 499 U.S. at 535, by most courts of the term is that "bodily injury" does not include emotional damages unrelated to physical injuries sustained in the accident.

Thus, plaintiffs' reliance on the Montreal 1999 Minutes to support their more liberal construction of the Warsaw Convention misconstrues the Minutes and is, in

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[6] Other parties to the Warsaw Convention have adopted Floyd's reasoning. See, e.g., King v. Bristow Helicopters Ltd., 2002 N.R. Lexis 84, 286 N.R. 201, 2002 UKHL 7; Kotsambasis v. Singapore Airlines Ltd., 42 N.S.W.L.R. 110, 1997 WL 1881044 (NSWCA) (Court of Appeals of New South Wales 1997), aff'd, 1997 LEXIS 895 BC9703587 (Supreme Court, New South Wales 1997).

any event, unavailing. In this case, plaintiffs' alleged emotional injuries include nightmares and a fear of flying. These injuries undoubtedly arose out of the American Airlines accident on May 8, 1999. These injuries, however, do not arise out of plaintiffs' bodily injuries. Accordingly, the district court did not err in dismissing plaintiffs' claim for emotional damages.[7]

CONCLUSION

The district court order dismissing plaintiffs' claim for mental injuries should be affirmed.

Respectfully submitted,

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[7] Article 18 of the Vienna Convention, cited by plaintiffs at pages 9 and 10 of their reply brief, is inapposite. Article 18 is not relevant to the question presented here which relates to treaty interpretation.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(7)(B). The foregoing brief is presented in Time New Roman 14 point font. The word count for the brief (as calculated by the WordPerfect 9.0 word-processing program, excluding exempt material) is 5,920, and is under the 7,000 word limitation.

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Attorney for the United States

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of August, 2003, I have caused the foregoing BRIEF OF THE UNITED STATES AS AMICUS CURIAE to be served by Federal Express, overnight delivery upon the Court and the following counsel:

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